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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY ARMEND ANGULO et al.,

Defendants and Appellants.

In re

ANTHONY ARMEND ANGULO,

on

Habeas Corpus.

B152072

(Los Angeles County
Super. Ct. No. GA042606)

B158370

APPEAL from judgments of the Superior Court of Los Angeles County,
Terry Smerling, Judge. As to Angulo, the judgment is affirmed and the petition for writ
of habeas corpus is denied. As to Camacho, the judgment modified and, as so modified,
affirmed.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and
Appellant Anthony Armend Angulo.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Ricky Ruben Camacho.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jeffrey B. Kahan and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Armend Angulo and Ricky Ruben Camacho appeal the judgments entered after conviction by jury of murder, burglary, and forgery. (Pen. Code, §§ 187, 459, 484f, subd. (b).) The jury additionally convicted Angulo of driving a vehicle without the owner's consent and unlawful possession of a firearm by a felon. (Veh. Code, § 10851; Pen. Code, § 12021, subd. (a)(1).) ¹ The trial court found Angulo had three prior convictions within the meaning of the Three Strikes law and two prior convictions within the meaning of section 667, subdivision (a)(1), and sentenced Angulo to a term of 80 years to life in state prison. The trial court sentenced Camacho to a term of 15 years to life in state prison.

We affirm the convictions but order Camacho's abstract of judgment corrected to reflect the oral pronouncement of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Prosecution's evidence.

a. Theft of Linda Chen's van.

On April 19, 2000, sometime prior to 10:30 p.m., Linda Chen's white Toyota van was taken from a parking lot in Rosemead. The parking lot is about five blocks from Angulo's home, which is two blocks from Camacho's home.

¹ Subsequent unspecified statutory references are to the Penal Code.

b. *Robbery of Delmy Villeda.*

That same night, at approximately 10:30 p.m., Delmy Villeda was walking in South Pasadena when three Hispanic males got out of a white van. A fourth male remained in the driver's seat. One of the three males had a knife and demanded Villeda's purse. The males pushed Villeda to the ground and took her purse, which contained her identification and credit card.

c. *Burglary of the Duarte Wal-Mart.*

On April 20, 2000, a female purchased approximately \$400 worth of electronic merchandise at the Duarte Wal-Mart using Villeda's credit card. A composite video tape showed Camacho and Angulo selecting items of merchandise and giving them to the female. The security guard who prepared the videotape followed the three out of the store and saw them enter Chen's white Toyota van. Angulo wore gloves inside Wal-Mart.

d. *The murder of Genaro Martinez.*

On April 25, 2000, at 2:19 a.m., Sheriff's Deputy Nelson heard shots while patrolling on the street that parallels La Merced Street in South San Gabriel. Nelson turned toward La Merced Street and, approximately 30 seconds after hearing the shots, saw a tan Toyota van occupied by three males traveling east. Nelson broadcast that the passengers appeared to be male Latinos, between the ages of 18 and 25, weighing approximately 150 pounds. The van fled from Nelson at speeds up to 65 miles per hour. When the sliding door of the van opened during a turn, Nelson saw the rear passenger was wearing dark pants and a dark shirt with white striping or writing on it. The van stopped in the parking lot of Potrero Heights Park. Three males got out and ran. Nelson captured the driver, Angulo, who was wearing a T-shirt, shorts and gloves even though it was not particularly cold.

Montebello Police Officer Molinari heard a radio broadcast regarding suspects running from Potrero Heights Park and, within a minute, saw Camacho approximately 1,000 feet north of the park. Camacho ran up a driveway then stopped when he saw

Molinari's patrol car. Camacho was breathing heavily and sweating profusely. Camacho was wearing dark pants and a black T-shirt with "Dodgers" written on it in white letters. Camacho told Molinari that someone shot at him in the park. However, Molinari had been on patrol in the area and had not heard any shots. Later that morning, Camacho told a deputy sheriff he had been in the park with his girlfriend, Monica, when shots were fired from a van.

The third individual who ran from the van was not apprehended.

Genaro Martinez was found shot to death on the sidewalk of La Merced Street. Martinez had been struck once in the upper right back, twice in the ankle and once in the calf. The round that struck Martinez in the back was immediately fatal. Investigators found ten .22 caliber casings strewn along a 35 foot section of La Merced Street, mainly in a gutter across the street from Martinez's body.

Ballistic experts determined the fatal shot had been fired from a .22 caliber rifle found on the floor of the van between the front seat and the rear seat. Deputies also found a baseball cap behind the driver's seat of the van with "Nene," the nickname of Rene Armendariz, written on it. Also found in the van were personal papers belonging to Delmy Villeda.

Swabs taken from Camacho's hands contained particles unique to the combustion of ammunition primer. This tended to show Camacho had fired a weapon or had been in the immediate vicinity of a firearm discharge shortly before the test. Angulo had particles of molten lead on his hands that were consistent with gunshot residue but these could have been from an environmental or occupational source.

e. *Gang enhancement evidence.*

Deputy John Stilgenbauer testified the shooting of Martinez occurred in the heart of Lomas gang territory. Martinez was a Lomas associate; Martinez's brother is a member of Lomas and the Mexican Mafia who currently is imprisoned at Pelican Bay. Angulo and Camacho both lived in Lomas territory. Stilgenbauer identified a photograph of Camacho with Jerry Salas, a Lomas gang member or associate.

Monterey Park Detective Larry Giannone testified Camacho and Armendariz were associated with Lomas in 1997 and 1998 but began to affiliate with White Fence, a clique of the Avenues gang, in 1999. Armendariz also associated with members of Lomas and Prima Flats.

Camacho and Armendariz were arrested together in Alhambra on July 12, 1997, after covering the interior of a restaurant bathroom with gang style graffiti that included the name “Nene,” which was written in the same fashion on the hat found in the van.

On April 26, 1999, Armendariz was hospitalized after being severely beaten by two members of Lomas, Steve Rangel and Daniel Ahumada. Armendariz walked with a cane for about six months after the attack. Rangel and Ahumada were convicted of felony assault with a great bodily injury enhancement and were imprisoned for nine and eight years, respectively, for the attack. Rangel told investigators Armendariz was beaten because he had seduced Rangel’s sister. Rangel said it was “personal business.”

On December 17, 1999, Camacho explained to a police officer that he carried illegal pepper spray because Lomas gang members thought he had joined another gang and were after him.

Los Angeles Police Detective John Padilla opined Angulo was an active member of the Avenues gang in the year 2000 based on a photograph of Angulo making an Avenues hand sign. Padilla testified only active gang members throw gang signs. Avenues is one of the largest gangs in Southern California with as many as 800 members. The gang commits murders, robberies, burglaries, drive-by murder and assaults and intimidates witnesses. Angulo has extensive gang tattoos, including “Avenues” on his head. Padilla investigated an incident in January 2000 in which Angulo was shot in Avenues’ territory.

Sheriff’s Detective Richard Ramirez testified gang members wear baggy shorts cut below the knee with long white socks to announce their devotion to the gang lifestyle and for intimidating effect. Angulo and Camacho were dressed in this fashion at the time of

their arrest. Ramirez opined each gang member in the van knew what was about to happen on the night of the shooting.

2. *Defense evidence.*

a. *Camacho.*

Camacho's brother testified he and Camacho made M-80 firecrackers on the day of Camacho's arrest. In the process, they fired the primer mechanism of empty shells.

Ray Valdez drove Camacho to the park after midnight on April 25, 2000.

b. *Angulo.*

A ballistics expert opined the expended casings found on La Merced Street had been fired from outside the van. The shooter most likely had moved along the curb across the street from Martinez as he fired.

Twenty-five-year-old Angulo testified he formerly belonged to Avenues gang but had ceased active membership. Angulo admitted he had been convicted of three felonies involving dishonesty in 1992 at 17 years of age. Angulo got his Avenues tattoos in prison at 19 years of age to protect himself from predators. Angulo grew up and continues to live in Lomas territory. Many of Angulo's friends became members of Lomas and Angulo has no grudge against any member of Lomas. In 1999, Angulo began to spend time at the home of 17-year-old Camacho because Angulo was interested romantically in Camacho's mother, Edna Baez. Angulo admitted the intimate relationship he sought with Baez never materialized.

On April 20, 2000, Angulo drove Camacho, Camacho's girlfriend and Angulo's cousin Rudy to Wal-Mart in Duarte as a favor to Camacho because Camacho did not have a driver's license. Camacho told Angulo the van belonged to his girlfriend's parents, his girlfriend wanted to shop and she would purchase something for Angulo if he drove. The ignition of the van was intact and it started with a key. Angulo admitted he carried electronic merchandise to the van wearing gloves, then returned to Wal-Mart.

On the night of the shooting, Angulo was relaxing at Camacho's home when Camacho, Camacho's girlfriend, Armendariz, a 25-year-old male named Payaso,

a 30-year-old male known as Red and a 19-year-old male known as Weasel arrived at the house. Camacho and his friends wanted to get beer before the liquor store stopped selling it at 2:00 a.m. Payaso indicated he had a credit account at one liquor store. Camacho asked Angulo to drive the van and Angulo agreed. Camacho and Weasel went with Angulo in the van. The others went in Payaso's car because they did not plan to return to Camacho's home. When the group saw police officers outside the first liquor store, they decided to go to another.

The route to the second liquor store took them onto La Merced Street where Payaso stopped and pointed at something. Angulo stopped behind Payaso. Angulo saw a male walking toward them on the other side of the street, then heard the sliding door of the van open and saw Weasel exit the van with something long in his hands. Angulo heard Weasel ask the pedestrian where the pedestrian was from. After the pedestrian answered, Camacho got out of the van and followed Weasel out of Angulo's sight behind the van. Angulo heard gunshots then saw the pedestrian run and fall. Angulo could not see who fired the shots but "knew pretty sure" it had been Weasel because the long object Weasel took with him from the van must have been a gun. Angulo could not drive forward because Payaso's car blocked him and Camacho was behind the van.

When Camacho and Weasel returned to the van, both got into the back seat. Weasel said to Camacho, "Give me that." Weasel then pointed a handgun at Angulo and told Angulo to drive. Even after the police began to chase them, Weasel threatened to kill Angulo if he did not continue to follow Payaso. Angulo pulled next to Payaso at Weasel's direction. Weasel asked Payaso to cut off the police and take the rifle but Payaso turned right. Camacho and Weasel told Angulo to take them to the park. Angulo ran after the van stopped only to avoid Weasel.

On a jail bus, Camacho told Angulo that he, Weasel and Payaso intended to rob a liquor store that night and they enlisted Angulo's assistance without telling him of the plan because they knew he would not flee due to his loyalty to Camacho's family. Camacho said "they weren't planning to do the murder itself; . . . they were planning to

do a robbery.” Camacho also told Angulo not to worry about the robbery of Villeda because Angulo could not be connected to it.

On cross-examination, Angulo admitted he had been shot while driving in Avenues gang territory in January of 2000, a few months before this shooting. Angulo initially refused to identify the shooter and told the police he believed he had been shot for failing to fulfill some obligation to Avenues and for dropping out of that gang. Angulo admitted the shooter had been a member of Avenues. Angulo denied he was making an Avenues gang sign in a photograph of him taken in early 2000. Angulo admitted he was wearing shorts, a T-shirt and gloves on the night of the shooting and at Wal-Mart. Angulo claimed he wears gloves because his hands and feet get cold.

3. *Rebuttal.*

a. *The People.*

Officer Nelson testified there were no other cars in the area during the chase of the van on the night of the murder.

b. *Camacho.*

Edna Baez, Camacho’s mother, testified Angulo visited Baez’s home to see the teenage daughters of Baez’s roommate, not Baez. On the night of the shooting, neither Baez nor Camacho was at home. Camacho stayed overnight with his brother after taking him to physical therapy.

c. *Angulo.*

Baez told an investigator that Camacho failed to appear to take his brother to a medical appointment.

4. *Sentencing considerations.*

The jury convicted appellants of burglary and forgery committed at Wal-Mart but acquitted them of the robbery of Delmy Villeda. With respect to the homicide, the jury found Angulo and Camacho guilty of first degree murder committed for the benefit of a criminal street gang in which a principal discharged a firearm. The jury found not true a personal use of a firearm allegation as to Camacho. The jury also convicted Angulo of

driving a vehicle without the owner's consent and possession of a firearm by a felon. The trial court found Angulo's prior conviction allegations true.

Prior to sentencing, the trial court granted, in part, appellants' motion for a new trial by reducing their murder convictions to second-degree murder. The trial court indicated it had a reasonable doubt as to whether the evidence showed premeditation and deliberation. The trial court also struck the criminal street gang enhancement for want of sufficient evidence of the requisite specific intent to benefit a criminal street gang. The trial court indicated there was "very little" evidence as to what motivated appellants and there was no evidence of any personal animosity between appellants and Martinez. The trial court dismissed the criminal street gang allegation for insufficient evidence.

The trial court denied Angulo's petition for writ of habeas corpus, which the trial court construed as a motion for new trial or mistrial.

The trial court sentenced Angulo to a third strike term of 80 years to life in state prison consisting of 45 years to life for second degree murder, 25 years to life for burglary of Wal-Mart, and two 5-year enhancements under section 667, subdivision (a)(1). The trial court sentenced Camacho to a prison term of 15 years to life for second-degree murder.

CONTENTIONS

Angulo and Camacho contend the trial court erroneously admitted gang evidence and improperly permitted the gang expert to express an opinion about their state of mind.

Angulo separately contends the trial court inadequately instructed the jury on constructive possession and should have treated Angulo's post verdict motion as one for substitution of counsel.

Angulo also has filed a petition for writ of habeas corpus in which he contends defense counsel rendered ineffective assistance.²

² We previously ordered Angulo's writ petition to be considered concurrently with this appeal.

Camacho separately contends the trial court improperly excluded exculpatory portions of his statements to Angulo, prejudicially refused to sever Camacho's trial from Angulo's and improperly instructed the jury in the words of CALJIC No. 17.41.1. Camacho further claims the cumulative effect of the trial court's errors requires reversal, the term imposed constitutes cruel and unusual punishment and the abstract of judgment must be corrected.

DISCUSSION

1. No reversible error appears in the admission of gang evidence.

a. Angulo.

Angulo contends the trial court should have excluded evidence of his membership in the Avenues gang because that fact was not in dispute and the evidence served only to burden the defense and impugn Angulo's credibility in the eyes of the jury, thereby resulting in an unfair trial which violated Angulo's right to due process. Angulo argues he and Camacho were associated with different gangs and there was no evidence the two gangs were related. Rather, the evidence showed Camacho had a personal grudge against Lomas based on the attack on his friend, Rene Armendariz, a year earlier. Thus, Camacho's motive for the attack on Martinez was personal and Angulo's motive was based on his relationship with Camacho, not allegiance to a gang. Angulo argues the evidence in support of the criminal street gang enhancement should not have been admitted in the first place because it was obvious, based on the prosecutor's various summaries of the evidence prior to trial, that the criminal street gang enhancement would fail.³ Angulo claims reversal is required.

³ Before trial, the prosecutor's theory was that Martinez had been killed to benefit White Fence because the brother of Martinez was a member of the Mexican Mafia. In opening statement, the prosecutor argued Martinez died in a gang related drive by shooting. The prosecutor indicated Angulo is a member of Avenues and Camacho is an associate of White Fence and there was animosity between Camacho and members of Lomas who had severely beaten Armendariz, a friend of Camacho's.

In the writ petition, Angulo asserts defense counsel should have challenged the gang enhancement prior to trial or objected to the introduction of the gang evidence. Angulo attaches as an exhibit to the writ petition a letter from defense counsel in which defense counsel indicates at least some gang evidence properly would have been admitted as to both defendants based on the allegation of the criminal street gang enhancement and defense counsel wanted as much of this evidence as possible admitted against Camacho.

Defense counsel wrote: “Frankly, I was not as afraid of gang evidence as to Mr. Angulo as you seem to think I should have been. The evidence known to me was limited and did not indicate current activity. Also, the lack of any connection between Avenues and Lomas and/or White Fence was strong circumstantial evidence corroborating my client’s claim the shooting was a total surprise to him and motivated by personal and/or gang-related reasons of Camacho Furthermore, I wanted to be able to present evidence of the victim’s connection to the Mexican Mafia. The only way to do so was to be able to offer it to rebut the prosecution’s contention that the shooting was because of a Lomas vs some-other-gang feud.”

Angulo argues defense counsel’s letter demonstrates counsel improperly assumed gang evidence was admissible. However, neither the gang experts nor the prosecutor ever indicated which gang the shooting benefited. Thus, the inadmissibility of gang evidence should have been apparent prior to trial.

Consideration of Angulo’s claim reveals defense counsel’s decision not to object to the gang evidence was the product of an informed tactical choice. The decision whether to object to evidence at trial is a matter of tactics and, because of the deference accorded such decisions on appeal, will seldom establish that counsel was incompetent. (*People v. Farnam* (2002) 28 Cal.4th 107, 202; *People v. Lucas* (1995) 12 Cal.4th 415, 444; *People v. Avena* (1996) 13 Cal.4th 394, 444-445; *People v. Freeman* (1994) 8 Cal.4th 450, 485.)

Here, as indicated in defense counsel’s letter, the Avenues gang evidence was not particularly prejudicial to Angulo and defense counsel believed evidence of Angulo’s

affiliation with Avenues demonstrated the absence of a gang motive for the shooting of a Lomas gang member. Additionally, the gang evidence provided a motive for Camacho to commit the shooting and thus tended to support Angulo's theory of the case.

Because defense counsel's tactical decision was well within the range of reasonable competence, this court will not second guess counsel on appeal. Accordingly, Angulo's claim of improper admission of this evidence, and the related claim of ineffective assistance of counsel for failure to object to the evidence, both fail.

b. *Camacho*.

Camacho contends the trial court erred in admitting evidence of his gang association and other generic gang evidence. Specifically, Camacho asserts the trial court should have excluded evidence of the 1997 restaurant graffiti incident and the 1999 pepper spray incident. Camacho asserts his Lomas and White Fence associations had no probative value and, even if some gang evidence was admissible under Evidence Code section 1101 to show motive, the People needed only to show the victim was a Lomas member, not that appellants were gang members. Camacho asserts that if the evidence was insufficient to support the criminal street gang enhancement, the trial court erred in admitting the evidence at trial without sufficient scrutiny.

Camacho also contends the admission of gang evidence resulted in gross unfairness. Camacho analogizes to cases involving misjoinder which hold that, even in the absence of a motion to sever, consolidation may nonetheless result in such gross unfairness as to deprive the accused of a fair trial.

Camacho reasons the jury must have believed the third person in the van had been the shooter because it found the firearm use allegation not true. Camacho argues the shooter may have had a motive to shoot Martinez separate from the motives shown by the evidence at trial. If so, Camacho had merely been present at the scene of the shooting. Camacho claims the jury might have acquitted had it not heard the gang evidence. Camacho argues evidence of guilt was not overwhelming in that Camacho explained the

gunshot residue on his hands and, even if he had not explained the residue, he may have merely handled the weapon after the shooting.

As Camacho essentially concedes, gang evidence was admissible in this case under Evidence Code section 1101, subdivision (b), to prove intent, motive, knowledge and plan. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) The People were entitled to present evidence that suggested a motive for the shooting of Martinez. On this issue, the experts' testimony was relevant and highly probative. The fact the shooting may have had another undisclosed motive does not mean the People may not introduce evidence that tends to show a motive for the shooting. Admission of this evidence was not an abuse of the trial court's discretion. (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196; *People v. Page* (1991) 2 Cal.App.4th 161, 187.)

Camacho's claim the motivation for the shooting may have been personal does not alter the result. Where a shooting is carried out in a gang fashion by gang members, it reasonably may be found to have been gang related. Thus, the fact the incident may arise out of personal animus does not mean the conduct was not gang related.

Additionally, the trial court concluded the graffiti and pepper spray incidents were not as inflammatory as the charged offenses and rejected the defense theory that evidence indicating Martinez had been killed to retaliate for the beating of Armendariz was unduly prejudicial. No abuse of the trial court's discretion appears in this assessment. The incidents had great probative value in that they showed a motive to retaliate against Lomas based on Camacho's friendship with Armendariz.

Camacho's claim the inadmissibility of the gang evidence was demonstrated by the failure of proof at trial is not persuasive. As noted above, gang evidence was admissible to prove intent, motive, knowledge and plan. Also, there was a legitimate jury question as to whether the murder had been committed for the benefit of a criminal street gang. Merely because the trial court ultimately concluded the prosecution had failed to prove a benefit to any particular gang does not mean the gang evidence should not have

been admitted. The issue was a disputed one and the People were entitled to present relevant evidence.

Finally, because there was no gross unfairness at trial as Camacho alleges, his analogy to misjoinder cases is inapt.

2. *The expert gang testimony on knowledge of the van's occupants.*

Appellants contend gang expert Ramirez should not have been permitted to opine that: if three gang members drive in a stolen van to the heart of gang territory at 2:15 a.m. and fire 10 shots at an individual, every person in the van will know what is about to happen and the crime is committed for the benefit of a criminal street gang; when one or more gang members shoots someone in a drive-by shooting, everyone in the vehicle knew beforehand that a drive-by shooting was planned.

Appellants contend the opinion usurped the jury's function and it lacked foundation in that the evidence suggested the fatal shot was not fired from inside the van. Angulo argues even a psychiatrist is not permitted to express an opinion about a defendant's state of mind. Angulo claims the gang expert testimony devastated his defense that he thought he was driving Camacho and Weasel to the liquor store.

Camacho argues expert testimony of this nature may have an undue effect on the jury and may have prevented the jury from giving fair consideration to his defense. Camacho notes that even according to Angulo, Camacho said they were planning a robbery, not a shooting. Thus, the improper opinion evidence may have prompted the jury to convict Camacho as an aider and abettor. Camacho argues the reduction of the conviction to second-degree murder does not correct the error because Ramirez's testimony ended any hope of acquittal as an aider and abettor.

People v. Gardeley, supra, 14 Cal.4th at page 619, upheld the admission of expert opinion concerning whether a particular incident was "gang-related activity" and whether the primary purpose of a particular gang was to commit specified offenses. Thus, expert gang testimony may encompass the ultimate issue in the case. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; *People v. Valdez, supra*, 58 Cal.App.4th at p. 506.)

However, an expert may not express an opinion as to the guilt or innocence of the accused because this is the function of the jury. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47.)

People v. Killebrew (2002) 103 Cal.App.4th 644, 658, found it error to allow a gang expert to testify that each of the individuals in a caravan of three cars (1) knew there was a gun in the Chevrolet and a gun in the Mazda, and (2) jointly possessed the gun with every other person in all three cars for their mutual protection. *Killebrew* found this testimony much different from testimony related to the *expectations* of gang members in general when confronted with a specific action. *Killebrew* observed no case following *Gardeley* had permitted testimony that a specific individual had specific knowledge or possessed a specific intent. (*People v. Killebrew, supra*, at p. 658.) *Killebrew* reversed because the expert testimony was the only evidence linking the defendant to the charged offense.

Killebrew conceded a gang expert properly could testify “that a gang would expect retaliation as a result of a shooting . . . , that gangs would travel in large groups if expecting trouble, that in a confrontation more than one gang member may share a gun in some identified circumstances, and that oftentimes gang members traveling together may know if one of their group is armed” (*People v. Killebrew, supra*, 103 Cal.App.4th p. 658.)

Ramirez’s testimony was not far removed from the foregoing examples of properly admitted opinion evidence. Moreover, assuming for the sake of discussion that Ramirez’s testimony violated *Killebrew*, the error does not require reversal. Unlike *Killebrew*, the erroneously admitted testimony in this case was not the only evidence offered in support of the murder charge. Angulo was captured running from the van. Also, his testimony that he was unaware of the presence of the rifle in the van and did not anticipate a shooting was belied by his participation with Camacho in the burglary of Wal-Mart, which demonstrated appellants jointly were involved in criminal activity committed from the van.

With respect to Camacho, his clothing matched the description of the individual seen in the back seat of the van, he was breathing heavily and sweating profusely when he surrendered approximately 1,000 feet north of the park a minute after a broadcast of a male Hispanic fleeing the park, and Camacho had gunshot residue on his hands. Additionally, the evidence showed Camacho had a motive to avenge the beating administered to his friend, Rene Armendariz, who likely had been the third party in the van based on the presence of his hat.

In sum, there was convincing evidence of appellants' guilt absent Ramirez's expert testimony. Additionally, the trial court eliminated any prejudicial effect this evidence may have had by reducing the murder conviction to second degree murder over the prosecutor's vehement objections. Thus, reversal is not required.

3. *No reversible error appears in the trial court's instruction on possession.*

The trial court instructed the jury on actual and constructive possession in the words of CALJIC No. 12.00, which defines actual possession as knowing exercise of direct physical control over a thing and constructive possession as knowing exercise of control over or the right to control a thing, either directly or through another person or persons.

Angulo contends the trial court should have modified this instruction to advise the jury that mere access and proximity to an object are insufficient, in and of themselves, to prove constructive possession. Failure to do so, Angulo asserts, violated the rule requiring the trial court to instruct on general principles of law relevant to issues raised by the evidence. Angulo claims there was no evidence he saw or handled the rifle before the shooting and there is a reasonable probability a properly instructed jury would not have convicted Angulo of possession of the rifle.

Angulo failed to request amplification of the instruction. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1192.) Thus, any error has been waived.

In any event, the instruction was proper and required no amplification. Under the instruction given, if Angulo was not aware of the presence of the rifle in the van, he could not have been in actual or constructive possession of it. Thus, this claim fails.

4. *Angulo's motion for new trial did not trigger an obligation on the part of the trial court to conduct a hearing to determine whether Angulo was entitled to substitution of counsel.*

Prior to sentencing, Angulo, acting in propria persona while still represented by appointed defense counsel, filed a supplemental motion for new trial which alleged ineffective assistance based on defense counsel's failure to investigate thoroughly prior to trial and failure to move to sever Angulo's case from Camacho's. Angulo also alleged defense counsel improperly elicited evidence concerning the January 2000 incident in which Angulo was shot.

The trial court indicated it was ready to deny the motion unless Angulo had anything further to support it. Angulo replied in the negative. The trial court then indicated Angulo's assertions either were not supported by competent evidence or were not prejudicial. The trial court stated: "I would say that you're blessed with having an extremely competent attorney You may not like the outcome. You may not like what he did. But, believe me, he's extremely competent."

Angulo contends the trial court had a duty to inquire under *People v. Marsden* (1970) 2 Cal.3d 118 because the motion alluded to strategic decisions that were not matters of record. Angulo argues the trial court should have given Angulo an opportunity to specify the reasons for his dissatisfaction with counsel and, if appropriate, the trial court must make further inquiry on its own to determine whether to appoint new counsel to argue a motion for new trial. (*People v. Smith* (1993) 6 Cal.4th 684, 694.) Angulo argues the conviction must be reversed because remand for a *Marsden* hearing is an inadequate remedy at this juncture due to the passage of time.

We conclude Angulo's motion for new trial based on ineffective assistance of counsel did not require the trial court to conduct a *Marsden* hearing primarily because

Angulo did not seek substitution of counsel. “A trial judge should not be obligated to take steps toward appointing new counsel where defendant does not even seek such relief.” (*People v. Gay* (1990) 221 Cal.App.3d 1065, 1070; see also *People v. Lucky* (1988) 45 Cal.3d 259, 281; *People v. Crandell* (1988) 46 Cal.3d 833, 854-855.) Angulo listed his dissatisfactions with defense counsel in writing and the only remedy Angulo sought was a new trial. Thus, there was no need for the trial court to inquire as to other bases for substitution of counsel.

In any event, the trial court ruled on the motion as if it were a *Marsden* motion. (*People v. Horton* (1995) 11 Cal.4th 1068, 1103-1104.) The trial court asked if Angulo had anything further to support the motion and Angulo replied he did not. The trial court denied the motion on the merits and noted defense counsel had performed competently.

Finally, nothing in the record suggested defense counsel had failed to provide adequate representation or that counsel and Angulo had become embroiled in such an irreconcilable conflict that ineffective representation was likely to result. On the contrary, based on the letter submitted by defense counsel in connection with Angulo’s petition for writ of habeas corpus, it appears defense counsel had a reasonable tactical basis for not objecting to the gang evidence and there was no need to seek bifurcation because the presence of Camacho as a codefendant benefited Angulo’s defense strategy.

Thus, even on appeal, Angulo is unable to show any basis upon which the trial court properly might have appointed new counsel to assist Angulo.

5. *No error appears in the trial court’s ruling to exclude a portion of Camacho’s statement to Angulo on the jail bus.*

At a hearing outside the presence of the jury, Angulo testified that on a jail bus ride with Camacho, Angulo asked Camacho why Camacho did not tell him what was going to happen. Camacho replied he had not been aware that a shooting was going to happen, he did not plan a shooting, that was not their intention. They were going to rob a liquor store.

Defense counsel argued Camacho's statement should have been admitted in its entirety. However, the trial court concluded Camacho's exculpatory statements were not against his penal interest and thus were hearsay. Camacho contends this ruling denied Camacho due process of law.

It appears Camacho's claim has merit. Evidence Code section 356 provides that where part of a conversation "is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party" Under this section, the trial court should have permitted Camacho to inquire into the whole of the Angulo's conversation with Camacho on the jail bus. (*People v. Douglas* (1991) 234 Cal.App.3d 273, 285.)

However, as Camacho concedes, notwithstanding the trial court's ruling, at trial, Angulo testified Camacho told him on the jail bus and said "they weren't planning to do the murder itself; . . . they were planning to do a robbery."

Camacho argues Angulo's testimony does not mitigate the trial court's error because the jury would expect to hear more details such as Camacho did not know what was going to happen, he did not intend a shooting and he knew nothing about shooting anyone. Camacho asserts omission of these additional statements prevented the jury from fairly evaluating whether Camacho aided and abetted the shooting.

We disagree. The additional statements add nothing of substance to Angulo's testimony that Camacho said he was unaware of a shooting and that he had planned a robbery. Because Angulo's testimony adequately conveyed Camacho's statement he intended only to rob a liquor store, not to shoot anyone, Camacho cannot show prejudice in the trial court's erroneous ruling.

6. *The trial court committed no reversible error in denying Camacho's requests for severance, mistrial and new trial.*

During opening statement, Angulo's counsel stated he intended to prove Camacho duped Angulo into driving and the shooting occurred before Angulo knew what had happened. Thereafter, Camacho sought severance on the ground Angulo's defense conflicted with Camacho's defense of alibi and misidentification. Camacho also sought

mistrials, bifurcated jury deliberations for Camacho before Angulo testified and a new trial based upon improper joinder. Camacho claims the trial court should have granted these motions on the ground of antagonistic defenses because the acceptance of Angulo's defense precluded Camacho's acquittal.

Camacho argues Angulo's defense not only put Camacho at the scene but indicated Camacho actively was involved in the assault on Martinez and suggested Camacho had a handgun at the time of the shooting of Martinez. Camacho concludes reversal is required because consolidation resulted in gross unfairness.

To demonstrate that a denial of severance was reversible error, defendant must “ ‘clearly establish that there [was] a substantial danger of prejudice requiring that the charges be separately tried.’ ” (*People v. Davis* (1995) 10 Cal.4th 463, 508.) Even if the ruling were correct when made, reversal is required if the defendant shows joinder actually resulted in “gross unfairness,” amounting to a denial of due process. (*People v. Johnson* (1988) 47 Cal.3d 576, 590.)

Although Angulo's defense conflicted with Camacho's, they were not mutually exclusive in that Angulo conceded Camacho told him he did not plan a murder. The fact Camacho chose to present an implausible explanation for the gunshot residue on his hands and his presence in the park does not require severance. A joint trial at which the defendants present different and possibly conflicting defenses is not necessarily unfair. (*People v. Ervin* (2000) 22 Cal.4th 48, 68-69; *People v. Hardy* (1992) 2 Cal.4th 86, 168; *People v. Keenan* (1988) 46 Cal.3d 478, 500.) “ ‘Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.’ [Citations.]” (*People v. Hardy, supra*, at p. 168.)

Here, Angulo did not confess and implicate Camacho. (See *People v. Massie* (1967) 66 Cal.2d 899, 919.) Nor did Angulo's defense necessarily implicate Camacho. At sentencing, the trial court noted, in denying Camacho's motion for new trial, “I think

the evidence was ample against [Camacho] without Angulo's testimony. [Camacho's] at the scene. He's been running. He's caught. He has a cockamamie story. He has gunshot residue on him. That would have been plenty to convict him." Thus, even without Angulo's testimony, the evidence of Camacho's guilt was so convincing as to render any error in the admission of Angulo's testimony harmless.

Camacho claims Angulo's testimony indicated Camacho left the van with a handgun. However, the fatal shot was fired by the .22 rifle found in the van, not a handgun. Thus, the fact Camacho may have been armed at the time of the shooting does not necessarily mean Camacho aided or abetted the shooting. In fact, according to Angulo, Weasel took the handgun from Camacho upon their return to the van thereby indicating Weasel was the individual responsible for the shooting, not Camacho.

In sum, no abuse of the trial court's discretion appears in the refusal to grant the requests for severance, mistrial or new trial.

5. CALJIC No. 17.41.1.

The trial court instructed the jury in the words of CALJIC No. 17.41.1 to immediately advise the court if any juror refused to deliberate or expressed an intention to disregard the law or to decide the case based on penalty, punishment or any other improper basis.

Camacho claims this instruction improperly chilled deliberations, infringed on the power of the jury to nullify and violated the jurors' right of free speech and association. Camacho asserts the error defies analysis for prejudice and amounts to a structural defect which requires reversal per se.

These claims were rejected in *People v. Engelman* (2002) 28 Cal.4th 436, 444, decided after the trial in this case. *Engleman* held CALJIC No. 17.41.1 does not infringe upon a defendant's federal or state constitutional right to a trial by jury or to the state constitutional right to a unanimous verdict. However, in the exercise of its supervisory powers, the Supreme Court directed CALJIC No. 17.41.1 not be given in future trials to avoid the risk the instruction might be misunderstood or used by one juror to

“browbeat[]” other jurors or cause the trial court unnecessarily to intrude upon the secrecy of deliberations. (*People v. Engelman, supra*, at p. 445.) Nothing in the record of this case indicates any of these risks materialized. Thus, under any standard of review, the instruction did not prejudice appellants in this case.

9. *Cumulative effect.*

Camacho contends the cumulative effect of the trial court’s errors deprived him of a fair trial. As set forth above, none of the claims raised by Camacho is meritorious and consideration of the cumulative effect of the errors does not alter this conclusion. (*People v. Roberts* (1992) 2 Cal.4th 271, 326.)

10. *The term imposed does not constitute cruel and unusual punishment.*

Camacho contends the term imposed of 15 years to life is disproportionate to his individual culpability, the crime for which it is imposed, and it is excessive when compared to the punishment imposed for more serious offenses in this jurisdiction and when compared to the punishment imposed for the same offense in other jurisdictions. (*Solem v. Helm* (1983) 463 U.S. 277 [77 L.Ed. 2d 637]; *In re Lynch* (1972) 8 Cal.3d 410; *People v. Dillon* (1983) 34 Cal.3d 441.) Camacho argues he was 17 years of age at the time of the shooting, as was the defendant in *Dillon*, and his criminal history is minimal consisting of possession of a billy club and writing graffiti with a magic marker. Although Camacho had been ordered home on probation, had never previously been in juvenile custody and both defense reports submitted at the fitness hearing recommended Camacho be treated as a juvenile. Also, the trial court found no evidence of premeditation, whereas in *Dillon* there was evidence the defendant foresaw violence if the theft of growing marijuana were interrupted. Camacho asserts the term imposed must be reduced to offer Camacho a chance for release or modified to reflect a commitment to the California Youth Authority with the possibility of extensions beyond the age of 25 years.

This claim is meritless. Camacho was a gang member who committed numerous crimes, including the murder of Martinez, using a stolen van. The term of 15 years to life for these offenses does not shock the conscience or offend fundamental notions of human dignity. (*In re Lynch, supra*, 8 Cal.3d at p. 424.)

11. *The abstract of judgment must be corrected.*

Camacho contends the abstract of judgment must be corrected to reflect conviction of second degree murder, rather than first. The People concede the error and their concession appears well taken. We shall order the abstract of judgment modified to reflect the trial court's oral pronouncement of judgment.

DISPOSITION

As to Angulo, the judgment is affirmed and the petition for writ of habeas corpus is denied.

As to Camacho, the judgment is ordered modified to reflect a conviction of second degree murder, rather than first degree murder and, as so modified, affirmed. The clerk of the superior court shall prepare and forward to the Department of Corrections an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.